lishment of specified routes and termini for the jitneys, though no doubt a proper exercise of the police power,[17] tends directly to the benefit of the railways, in eliminating the jitney-drivers' practice of monopolizing and specializing upon the profitable short hauls. A limitation upon the fares to be charged is less clearly in the interest of the railways; but it is certainly quite within the police power.[18] Courts should, however, guard against upholding rates which, under the guise of regulation, are designed to be confiscatory.[19] In one recent case the railway has forsaken the rôle of public benefactor and has frankly sought relief by injunction as an injured individual where the jitneys were operating in violation of law.[20] Whether the mere infringement of a non-exclusive franchise affords ground for such relief is in some doubt on the authority, though by the better view an injunction will be given.[21] The court, however, in giving the injunction, took the additional ground that the jitneys, aside from their illegality,[22] were a public nuisance in fact, causing the plaintiff special damage. As a general rule, it is undisputed that an injunction may properly issue where these elements concur; [23] and impairment of general pecuniary condition is recognized as sufficient damage.[24] Nevertheless, in view of the fact that the diversion of trade from the plaintiff railway was due, not to the annoying character of the jitneys, but rather to their superior attractiveness to the public, as a means of transportation, it seems difficult to trace a proximate connection between the element of nuisance and the plaintiff's damage.

DOES THE FEDERAL EMPLOYERS' LIABILITY ACT SUPERSEDE STATE COMPENSATION LAWS AS TO INTERSTATE COMMERCE?— Since the case of *Gibbons* v. *Ogden* [1] there has been no room for doubt that the federal

[17] *Ex parte* Dickey, *supra*, 85 S. E. 781 (W. Va.).

[18] Munn *v.* Illinois, 94 U. S. 113.

[19] Philadelphia Jitney Ass'n *v.* Blankenburg, 72 Leg. Intell. 730 (Com. Pleas Ct. of Phila. Co., Pa., June, 1915), appears to give evidence of this tendency.

[20] Memphis St. Ry. Co. *v.* Rapid Transit Co., 179 S. W. 635 (Tenn.).

[21] The right on the part of a public utility operating under a non-exclusive franchise to an injunction against competition not publicly authorized, though in some dispute, seems generally conceded. Hudspeth *v.* Hall, 111 Ga. 510, 36 S. E. 770; Carroll *v.* Campbell, 108 Mo. 550, 17 S. W. 884; Cent. R. Co. *v.* Penn. R. Co., 31 N. J. Eq. 475, 493; Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040; Bartlesville, etc. Power Co. *v.* Bartlesville, etc. Ry. Co., 26 Okl. 453, 109 Pac. 228; Douglass' Appeal, 118 Pa. 65, 12 Atl. 834. *Contra*, Empire City Subway Co. *v.* Broadway, etc. Co., 87 Hun (N. Y.) 279, 33 N. Y. Supp. 1055, affirmed in 159 N. Y. 555, 54 N. E. 1092. See McEwen *v.* Taylor, 4 Greene (Ia.) 532; New Eng. Ry. Co. *v.* Central Ry. & Electric Co., 69 Conn. 47, 36 Atl. 1061; Coffeyville, etc. Gas Co. *v.* Citizens National Gas, etc. Co., 55 Kan. 173, 40 Pac. 326.

[22] Acts sanctioned by legislative authority cannot constitute a nuisance, even though if unauthorized they might have amounted to one in fact. Murtha *v.* Lovewell, 166 Mass. 391, 44 N. E. 347; Davis *v.* Mayor, 14 N. Y. 506. The question whether lack of such authority, where required by law, is sufficient to render an otherwise proper act a nuisance, involves the more general problem of the purpose of the legislature; discussed in 27 HARV. L. REV. 317 *et seq.*

[23] 1 HIGH, INJUNCTIONS, 4 ed., § 762.

[24] Draper *v.* Mackey, 35 Ark. 497; Keystone Bridge Co. *v.* Summers, 13 W. Va. 476; Rose *v.* Groves, 12 L. J. C. P. 251.

[1] 9 Wheat. (U. S.) 1.

control of interstate commerce is paramount to all state regulation.[2] As a corollary to this proposition the Supreme Court decided in the case of *Cooley* v. *Board of Wardens* [3] that in certain cases coming within the police power of the state there could be state regulation until Congress had acted; and this doctrine has been consistently followed.[4] When the federal government has acted, however, all state regulations on the subject are immediately superseded.[5] A nice problem has frequently been presented as to just what particular subject was intended to be covered by Congress,[6] but the tendency of the Supreme Court has been to give a broad scope to the federal regulation.[7] A recent New York decision allows a railroad employee, who was injured while engaged in interstate commerce, to recover under the state Workmen's Compensation Act. *Winfield* v. *New York Central & Hudson R. R. Co.*, 54 N. Y. L. J. 52, 110 N. E. 614.[8] The basis of the decision is that the federal Employers' Liability Act [9] applies only to those cases where the injury was due to negligence, and leaves untouched the field of liability without fault covered by the state statute. This question has been passed upon by four state courts during the last year and has received conflicting answers.[10]

It was urged by the lower court in New York [11] that the title of the federal act, "An Act relating to the liability of common carriers by railroad to their employees *in certain cases*," indicates that it does not cover all the grounds of liability. As has been pointed out,[12] however, these words were inserted to obviate the possibility of this act being declared unconstitutional, as was the first Employers' Liability Act,[13] because it

[2] Smith *v.* Alabama, 124 U. S. 465, 473; Railroad Co. *v.* Husen, 95 U. S. 465; and cases cited *infra* under notes 4 and 6.

[3] 12 How. (U. S.) 299.

[4] Nashville, C. & S. L. Ry. *v.* Alabama, 128 U. S. 96, 101; Hennington *v.* Georgia, 163 U. S. 299; Southern Ry. Co. *v.* Reid, 222 U. S. 424, 437; Minnesota Rate Cases, 230 U. S. 352, 402; Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280.

[5] Gulf, Colorado, & S. F. Ry. Co. *v.* Hefley, 158 U. S. 98; Second Employers' Liability Cases, 223 U. S. 1; Chicago, R. I. & Pac. Ry. Co. *v.* Harwick Farmers Elevator Co., 226 U. S. 426; Adams Express Co. *v.* Croninger, 226 U. S. 491, 506; Erie Railroad *v.* New York, 233 U. S. 671; Houston & Texas Ry. *v.* United States, 234 U. S. 342.

[6] See Leisy *v.* Hardin, 135 U. S. 100; Reid *v.* Colorado, 187 U. S. 137, 146; Northern Pac. Ry. Co. *v.* Washington, 222 U. S. 370, 378; Savage *v.* Jones, 225 U. S. 501, 533; Erie R. Co. *v.* New York, 233 U. S. 671, 683; Southern Ry. Co. *v.* Railroad Comm. of Ind., 236 U. S. 439.

[7] It is interesting to note that the New York court took the narrow view as to the effect of the federal Hours of Service Act. Erie R. Co. *v.* New York, 198 N. Y. 369. This act limited the hours of certain employees in interstate commerce to nine. The New York court upheld a state statute limiting the hours to eight on the ground that it merely "raised such limit of safety." The decision was overruled. 233 U. S. 670. The New York court might have said in the present case that they were merely "raising the standard of liability."

[8] For the facts of this case, see RECENT CASES, p. 459.

[9] 35 STAT. AT LARGE, Pt. I, p. 65. U. S. COMP. STAT. (1913), §§ 8657–8665.

[10] In addition to the Winfield case, *supra*, the New Jersey court reached the same result. Ronnsaville *v.* Central R. of N. J., 94 Atl. 392; Hammill *v.* Pennsylvania R. Co., 94 Atl. 313. The Illinois and California courts have come to the opposite conclusion. Staley *v.* Illinois Cent. R. Co., 109 N. E. 342; Smith *v.* Industrial Accident Comm., 147 Pac. 600.

[11] See Winfield *v.* New York Cent. & H. R. R. Co., 153 N. Y. Supp. 499, 500.

[12] See Staley *v.* Illinois Cent. R. Co., 109 N. E. 342, 349.

[13] First Employers' Liability Cases, 207 U. S. 463.

applied to intrastate commerce. There are several things, on the other hand, which point definitely to the conclusion that Congress intended to cover the entire field of employers' liability to employees in interstate transportation by rail. One of the compelling motives for the passage of the act was the desire for uniformity throughout the states, which is apparent from the message of the President urging the passage of the act,[14] and from the report of the judiciary committee of the House.[15] Again, the act was a recognition of the very social and economic factors which have prompted the Workmen's Compensation Statutes, and was the answer of Congress to the problem presented by those considerations.[16] Furthermore, the expediency of making the carriers liable regardless of negligence was considered and rejected by the committees in charge of the bill.[17]

The precise point presented here has not been decided by any federal court, but in 1914 the Supreme Court overruled a North Carolina decision [18] upon a point which is very much like the present one. A state statute made the employer absolutely liable for failure to afford the employee a safe place in which to work; but by the federal Employers' Liability Act the carrier was liable only for "any defect or insufficiency due to its negligence." The Supreme Court, in overruling the state court which had applied the local rule, said: "It is settled that since Congress by the Act of 1908 took possession of the field of the employers' liability to employees in interstate transportation by rail, all state laws upon the subject are superseded." In addition to this case there

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[14] Message of the President to Congress, Jan. 31, 1908, Sen. Doc. 213, 60th Cong., 1st Sess., in Vol. 8, U. S. Doc., 5241, at p. 1, "Interstate employment being thus covered by an adequate national law, the field of intrastate employment will be left to the action of the several states." To the effect that presidential messages may be used in determining the scope of legislation, see Kepner *v.* United States, 195 U. S. 100.

[15] Report of Committee on Judiciary, House Rep. 1386, 60th Cong., 1st Sess., in Vol. 2, U. S. Doc., 5226, at p. 1; and again at p. 3: "It [the present bill] will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employers' liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the states." See also Cross *v.* Chicago, B. & Q. R. Co., 177 S. W. 1127, 1130. To the effect that the reports of committees may be used in determining the scope of a statute, see Holy Trinity Church *v.* United States, 143 U. S. 457, 464; Chesapeake, etc. Tel. Co. *v.* Manning, 186 U. S. 238, 246; Binns *v.* United States, 194 U. S. 486.

[16] Report of Committee on Education and Labor. Sen. Rep. 460, 60th Cong., 1st Sess., in Vol. 2, U. S. Doc., 5219, at p. 2. "Yet somebody must assume these risks, and the tendency throughout the world in those countries where the industrial life of the community is thoroughly organized has been to modify the doctrine of negligence so as to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged; that is, upon the whole community. The proposed measure is intended to effect this reasonable reformation in our industrial code." See also Fulgham *v.* Midland Valley R. Co., 167 Fed. 660, 663.

[17] Report of Committee on Education and Labor, *supra*, at p. 2; Report of Judiciary Committee, *supra*, at p. 96.

[18] Seaboard Air Line *v.* Horton, 233 U. S. 492, 501, reversing 162 N. C. 77. It is interesting to note that this case was not referred to by the New York court, though decided almost eighteen months before their decision and over a year in advance of the argument before them.

have been a number of decisions by the state courts,[19] the lower federal courts,[20] and the Supreme Court [21] enunciating the same principle, though applied to facts less like those of the principal case. A practical argument against the result reached in New York was suggested in the dissenting opinion in the lower court,[22] namely, that it may become necessary for the employer to prove his own negligence, when sued in the state courts, in order to come in under the federal act. The employer would hardly choose to adopt this unpalatable course, especially as the question of negligence, being necessarily in issue as a jurisdictional fact in the state court, would seem to be *res judicata* in the federal court. "The result would be in most cases to give the injured party an option to claim under the Compensation Act or under the federal liability law." The fundamental error of the New York and New Jersey decisions seems to be that they consider a mere difference in the theory of recovery upon which the two acts are based tantamount to a difference in subject matter.

SUITS AGAINST FOREIGN EXECUTORS. — Although an executor is sometimes conceived as continuing the person of the decedent for the purpose of the devolution of property,[1] and although he has title to the decedent's chattels,[2] each state in which property is found may set up a separate administration; [3] and it is settled in most jurisdictions that at common law and in the absence of special circumstances [4] he cannot

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[19] Flanders *v.* Georgia & S. F. Ry. Co., 67 So. 68 (Fla.); Wagner *v.* Chicago & Alton R. Co. 265 Ill. 245, 106 N. E. 809; Corbett *v.* Boston & Maine R. Co., 219 Mass. 351, 107 N. E. 60; Kamboris *v.* Oregon & Washington R. & Navigation Co., 146 Pac. 1097 (Ore.); Eastern Ry. Co. *v.* Ellis, 153 S. W. 701 (Tex.).

[20] Fulgham *v.* Midland Valley R. Co., 167 Fed. 660, 662; Dewberry *v.* Southern Ry. Co., 175 Fed. 307; Taylor *v.* Southern Ry. Co., 178 Fed. 380, 382; Bottoms *v.* St. Louis & S. F. R. Co., 179 Fed. 318, 319.

[21] Second Employers' Liability Cases, 223 U. S. 1; Missouri, K. & T. Ry. Co. *v.* Wulf, 226 U. S. 570, 576; Mich. Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 66; St. Louis, I. M. & So. Ry. Co. *v.* Hesterly, 228 U. S. 702, 704, overruling 98 Ark. 240; Wabash R. *v.* Hayes, 234 U. S. 86, 89.

[22] Winfield *v.* New York Central & H. R. R. Co., 153 N. Y. Supp. 499, 504.

[1] See 1 WOERNER, ADMINISTRATION, § 157.

[2] See 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1384.

[3] See 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1360–1361; STORY, CONFLICT OF LAWS, 8 ed., § 513; 1 WOERNER, ADMINISTRATION, § 158.

[4] Where the executor having assets in his possession has repudiated the authority of his own state and taken them out of its power he may be sued where found. Williamson *v.* Branch Bank at Mobile, 7 Ala. 906; McNamara *v.* Dwyer, 7 Paige (N. Y.) 239; Lake *v.* Hardee, 57 Ga. 459. See Lewis *v.* Parrish, 115 Fed. 285, 287. But *cf.* Black *v.* Woodman, 5 Redf. (N. Y.) 363; Hedenbergh *v.* Hedenbergh, 46 Conn. 30. He may also be sued in any place where he meddles with assets. Marcy *v.* Marcy, 32 Conn. 308. *A fortiori* where he has committed both the above wrongs. Campbell *v.* Tousey, 7 Cow. (N. Y.) 64. However the doctrine of executor *de son tort* is generally obsolete. See Hopper *v.* Hopper, 125 N. Y. 400, 404, 26 N. E. 457, 458. An executor may be sued on a contract he has made as executor. Johnson *v.* Wallace, 112 N. Y. 230. And he may sue anywhere on a judgment he has recovered. Biddle *v.* Wilkins, 1 Pet. (U. S.) 686; Talmage *v.* Chappel, 16 Mass. 71; Lawrence *v.* Lawrence, 3 Barb. Ch. (N. Y.) 71. Such a judgment against him as plaintiff is also conclusive everywhere. Coram *v.* Ingersoll, 148 Fed. 169.